IN THE
MISSOURI SUPREME COURT
EN BANC

No. SC-83543

STATE ex rel. JEREMIAH W. (JAY) NIXON,

Relator,

v.

THE HON. GARY SPRICK, Associate Circuit Judge, and THE HON. NORMA PRANGE, Circuit Clerk,

Respondents.

On Petition for Writ of Certiorari
To the Circuit Court of Randolph County,
The Hon. Gary Sprick, Associate Circuit Judge

CORRECTED BRIEF OF RESPONDENT JUDGE SPRICK

Respectfully submitted,

JOHN WILLIAM SIMON
Mo. Bar No. 34535

P.O. Box 16005
Clayton, Missouri 63105

(314) 645-1776
FAX (314) 645-2125

Attorney for Appellant

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Jurisdictional Statement

Relator, Jeremiah W. (Jay) Nixon, sought a writ of certiorari to review the judgment that the Circuit Court of Randolph County (the Hon. Gary Sprick, Associate Circuit Judge) entered on January 22, 2001, issuing a writ of habeas corpus in favor of Terry L. Edwards. Mr. Edwards was the habeas corpus petitioner before the circuit court. After briefing, the Missouri Court of Appeals, Western District, denied the petition on March 28, 2001. Relator filed the pending successive petition before this Court. On May 30, 2001, this Court granted a preliminary writ. (S.L.F. 247.)

This Court has jurisdiction to grant writs of certiorari to review judgments granting writs of habeas corpus. *E.g.*, *E.W. v. E.D.M.*, 490 S.W.2d 64 (Mo. banc 1973). *See also* Mo. Const. art. V, § 4, ¶ 1 (authority to issue and determine original remedial writs).

Statement of Facts

This original writ proceeding arises on the petition of the relator, Attorney General Jay Nixon, attacking the action of the respondent judge, the Hon. Gary Sprick, granting a writ of habeas corpus to Terry Lee Edwards, directing that Mr. Edwards be resentenced in the Circuit Court of Jackson County, because the sentencing court

imposed his present sentence of imprisonment under a statute that had been repealed at the time of sentencing.[1]

On May 6, 1994, the prosecution obtained an indictment charging that Mr. Edwards had committed the offense of sodomy, an unclassified felony, Mo. Rev. Stat. § 566.060.2 (repealed), by touching the vagina of K.E., whom it represented to have been born on April 25, 1981; it alleged that this touching occurred between April 25, 1986, and October 15, 1993, when K.E. was less than fourteen years old but during part of which she was twelve years old. (S.L.F. 181.)[2] The prosecution also charged that Mr. Edwards had committed the class D felony of sexual abuse in the first degree, Mo. Rev. Stat. § 560.011, by placing his hand on K.E.'s breast; it alleged he did so during the same period, and that K.E. was less than twelve years of age at the time of the alleged touching. (S.L.F. 182.) On the first

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[1]Throughout the brief, the author will refer to Terry Lee Edwards, the petitioner in the habeas corpus court, as "Mr. Edwards," respondent Judge Sprick as "the respondent," and the Attorney General, who is seeking extraordinary relief from *this* Court, as "the relator."

[2]Counsel for Mr. Edwards will cite to the materials from the substitute legal file as "S.L.F." and to the transcript of the evidentiary hearing the habeas corpus court held in this matter on December 18, 2000, as "Tr."

count, Mr. Edwards was liable to imprisonment for a minimum of five years to a maximum of life. (S.L.F. 181.)

In its 1994 session, the Missouri General Assembly repealed the statute defining the unclassified offense of sodomy and replaced it with Mo. Rev. Stat. §§ 566.067-.068. These statutes define child molestation in the first and second degrees, respectively. The distinction between the two offenses was that if the same act occurred with a minor under the age of twelve, the offense was first degree and a class C felony; if it occurred with a minor between twelve and fourteen, it was a class A misdemeanor. (S.L.F. 206 & 240.) The effective date of this statutory change was January 1, 1995. (S.L.F. 205.) Consequently, the effective date of this statutory change was after the dates charged in the indictment but before Mr. Edwards's sentencing.

Under the 1994 amendments, child molestation in the first degree was a class C felony. Because Mr. Edwards was a "persistent offender" within the meaning of Mo. Rev. Stat. § 558.018.7 (S.L.F. 81-86), the range of punishment if the jury had found that K.E. was under twelve years of age at the time of the alleged touching around her vagina was up to twenty years's imprisonment. The range of punishment if it did not so find was up to one year in the county jail.

The State of Missouri tried Mr. Edwards before a jury in the Circuit Court of Jackson County on February 7, 1995. K.E. testified

that Mr. Edwards had touched her around her breasts or vagina on three occasions, once when she was twelve and twice when she was eleven. (S.L.F. 42-43 & 47-49.) At trial, the age question on the first count was whether K.E. was under fourteen, which was not at issue. The prosecutor adduced specific testimony that Mr. Edwards had touched her breasts when she was still eleven, but no analogous testimony that he had touched her vagina when she was still eleven. (S.L.F. 51-52.) A police officer testified that Mr. Edwards had admitted to having touched K.E. between the legs once. On continued direct examination by the prosecutor, while reviewing his report, the police officer's testimony continued:

> A. He was vague in his responses and the way he answered questions, "Yeah. I don't know. Yeah. That could have happened," or "Maybe," or something along that line during the initial interview that we were talking about."
>
> Q. How did he respond when you asked him if he had touched her underneath [K.E.'s] underwear?
>
> A. What page is that?
>
> Q. Sir, if you would turn to Page 5.

A. He responded—it was a two-part question. When I asked him if he did it, he answered, "I don't know, I really don't," which I followed up with, "Do you think you did?" And he said, "I'm not saying it couldn't have happened," which was the same way he had answered a previous question. It was kind of "Well, I'm not saying I didn't do it," type of response.

Q. So he could have touched her between the legs on this occasion, too?

A. Correct. [S.L.F. 78-79.]

Mr. Edwards admitted that he had accidentally touched K.E. between her legs, but only on one occasion and not in a sexual way. (S.L.F. 149-50.)

The jury returned a general verdict finding Mr. Edwards guilty on both counts. (S.L.F. 183.)

The sentencing court (the Hon. Charles Shangler, Senior Judge of the Missouri Court of Appeals, Western District) sentenced Mr. Edwards on April 11, 1995. (S.L.F. 165-80.) The prosecutor sought sentences of twenty-five years and five years on the two counts, with these sentences to be run consecutively for a total of thirty years.

(S.L.F. 176.) The sentencing court disagreed with this recommendation:

> Now, we have two convictions here, one of sodomy, this other of sexual abuse in the first degree. The evidence also was of prior crimes, felonies, which in each case have proven a status of prior offenses, Class X offender, which under the law puts you in other categories of possible punishment.
>
> I will say this, that in terms of the offenses which have been proven against you, in terms of the report anyway, that we have, that they are not characteristic of your conduct. What is more characteristic, perhaps, is the drinking and what that has brought about, and probably brought this, these episodes, about as well. It's not at all to minimize the seriousness of these events for the child. [S.L.F. 176-77.]

Applying the statutes no longer in effect, the sentencing court sentenced Mr. Edwards to imprisonment for eight years on the sodomy count and two years on the sexual abuse count, with these terms to run concurrently. (S.L.F. 177 & 184.)

Mr. Edwards filed a direct appeal of his conviction and sentence. Trial counsel continued to represent him on direct appeal, and did not raise the trial court's error in sentencing Mr. Edwards under a repealed statute. (*See*, *generally*, S.L.F. 186-91.) When trial counsel arrived at the Missouri Court of Appeals, Western District, to argue the case, he noticed that the trial judge was sitting on the panel; he told the court about this, and the trial judge was replaced. (Tr. 18-19.) That court affirmed the conviction and sentence. (S.L.F. 186-91.)

Through new counsel, Mr. Edwards filed a motion to recall the mandate, invoking Mo. Rev. Stat. § 1.160 and this Court's decision in *State v. Sumlin*, 820 S.W.2d 487 (Mo. banc 1991), as requiring his resentencing under the statute in place at the time of his sentencing. (S.L.F. 192-99.) The Missouri Court of Appeals granted the motion. (S.L.F. 200-02.) The State of Missouri sought and received transfer to this Court. (S.L.F. 203.) On January 5, 1999, this Court retransferred the case to the Missouri Court of Appeals, holding that a motion to recall the mandate was the wrong procedure for obtaining relief from the error in sentencing, and that the proper vehicle was habeas corpus. (S.L.F. 204-09.) The Court specified what Mr. Edwards needed to show in order to obtain relief:

> In the [habeas corpus] trial court, [Mr. Edwards] will have to establish that [1] the sentencing

> court did sentence him under the old sodomy law that had been repealed and [2] that his sentence exceeds the term that would have been imposed by the sentencing court for his conduct, whether the appropriate punishment is that established for child molestation in the first or second degree under the new statute. [S.L.F. 208-09.]

Through the undersigned counsel, Mr. Edwards filed a petition for habeas corpus in the venue of his confinement, the Circuit Court of Randolph County. (S.L.F. 1-10.) The case was assigned to the respondent judge, the Hon. Gary Sprick. After briefing, the respondent judge held an evidentiary hearing on December 18, 2000.

At the evidentiary hearing, the relator admitted that the sentencing court had sentenced Mr. Edwards under the old statute. (Tr. 67.) Mr. Edwards presented testimony from trial counsel to the effect that the trial judge appeared impressed with trial counsel's report that jurors had approached him to say the case was "a real close call for them" and that on the more serious of the two counts, the trial judge selected a sentence which was "three years up from the bottom of the range and say 40 or 50 years down from the top of the range." (S.L.F. 11-12.)

After further briefing, the respondent issued a judgment on January 22, 2001, granting the writ of habeas corpus. (S.L.F. 239-46.) It vacated Mr. Edwards's eight-year sentence, held that he should be sentenced for child molestation in the first or second degree, and remanded him to the custody of the Sheriff of Jackson County. (S.L.F. 245-46.)

Relator Attorney General Jay Nixon sought a writ of certiorari from the Missouri Court of Appeals, Western District. That court denied it on March 28, 2001. Relator filed a successive petition in this Court. The preliminary writ issued as a matter of course and right because the Attorney General sought it. *E.g.*, *State ex rel. Taylor v. Blair*, 357 Mo. 586, 591, 210 S.W.2d 1, 3 (1948). This Court issued its preliminary writ on April 30, 2001.

Points Relied On

I. Relator has failed to present an issue cognizable in certiorari, because the circuit court's decision of which he complains is not ripe for examination under this writ structure, in that the Circuit Court of Jackson County could resentence Mr. Edwards to the same term of imprisonment, with the effect that the relator will have suffered no prejudice.

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Argument

I. Relator has failed to present an issue cognizable in certiorari, because the circuit court's decision of which he complains is not ripe for examination under this writ structure, in that the Circuit Court of Jackson County could resentence Mr. Edwards to the same term of imprisonment, with the effect that the relator will have suffered no prejudice.

In *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 646, 117 S.W.2d 319, 321 (1938), this Court set forth a general rule that certiorari will lie only to attack final judgments or orders. Here, the relief Mr. Edwards received in the habeas corpus court was the right to resentencing in the Circuit Court of Jackson County under the law that applied at the time of his former sentencing rather than under law that did not apply at the time. (App. 245-46.)

Naturally Mr. Edwards hopes that the correct sentencing will result in his release, but the judgment of the Circuit Court of Randolph County does not guarantee it. Relator does not stand in the shoes of society in seeking to have its criminal laws enforced, as the prosecuting attorney would in such a resentencing; this relator seeks to deny Mr. Edwards any opportunity at all to have these laws enforced. Relator has not suffered prejudice for the purpose of evaluating the amenability of his claim to certiorari. No case that

depended on considerations of public safety in deciding whether to grant relief in certiorari, when the only showing is that the relator disagrees with the substance of the circuit court's decision, is authority for granting such relief here, where the supposedly threat to public safety resulting from an accused citizen's release is contingent on decisions by the responsible prosecuting attorney and the sentencing court. *Cf. State ex rel. Nixon v. Campbell*, 906 S.W.2d 369 (Mo. banc 1995), *cert. denied sub nom. Craig v. Caspari*, 517 U.S. 1107 (1996).

This Court would therefore do well to allow the resentencing to take place, and to allow the responsible prosecuting attorney to seek relief if he believes the Circuit Court of Jackson County has violated the law in resentencing Mr. Edwards.

II. Relator has failed to establish that the respondent exceeded his jurisdiction, as distinguished from deciding the case within his jurisdiction in a manner that the relator dislikes.

A. Certiorari is not an appeal, and the standard for granting relief is not whether the certiorari court agrees with the respondent judge but whether the respondent judge acted beyond his or her jurisdiction.

In a habeas corpus action under Mo. S. Ct. R. 91, Missouri law does not permit the unsuccessful custodian a right to appeal. It could

have. *See* 28 U.S.C. § 2253 (unqualified right to appeal for custodian in federal habeas corpus actions).

Instead of an appeal, the remedy for an unsuccessful state habeas corpus respondent is a petition for a writ of certiorari to the applicable appellate court. *In re C.S.N.*, 685 S.W.2d 567, 567 (Mo. App. E.D. 1984).

In Missouri law, the question on certiorari is not whether the habeas corpus court erred, clearly erred, or abused its discretion (as in an appeal), but whether it acted in excess of its jurisdiction. It is a collateral remedy that goes not to the merits of the dispute before another court, but to the competence of the other court to adjudicate it. Before joining this Court, JUDGE STITH explained that certiorari is limited to questions of law which touch and concern the jurisdiction of the court:

> The common law writ of certiorari is used to "confine an inferior tribunal within its jurisdictional limits." *State ex rel. Reorganized Sch. Dist. R-9 v. Windes*, 513 S.W.2d 385, 390 (Mo. 1974). It "presents only questions of law on the record brought up by the return and does not permit consideration of issues of fact." *Windes*, 513 S.W.2d at 390. "At common law,

> certiorari proceedings are not heard do novo and the reviewing court does not weigh the evidence, but deals only with questions of law that appear on the face of the record." *State v. Ladue Professional Building, Inc.*, 395 S.W.2d 316, 321 (Mo. App. E.D. 1965). [*State ex rel. Nance v. Board of Trustees*, 961 S.W.2d 90, 93 (Mo. App. W.D. 1998)]

This Court has maintained that certiorari is not an appeal or a substitute for an appeal, but a more limited form of action for situations in which the losing party does not have the right to an appeal:

> Certiorari is a remedy narrow in its scope and inflexible in its character. It cannot be made to serve the purpose of an appeal or writ of error. All that can be done under it is either to quash or to refuse to quash the proceedings of which complaint is made. [*State ex rel. Manion v. Dawson*, 284 Mo. 490, 504, 225 S.W. 97, 99 (Mo. 1920) (quashing writ).]

As the Court is well aware, the respondent could decimate the Mark Twain National Forest repeating such admonitions from this Court and other Missouri appellate courts regarding the limits on certiorari in Missouri law. What is the relator's response? He cites two cases, *State ex rel. Stewart v. Blair*, 357 Mo. 287, 299, 208 S.W.2d 268, 276 (banc 1947), and *State ex rel. Nixon v. Campbell*, 906 S.W.2d 369 (Mo. banc 1995), *cert. denied sub nom. Craig v. Caspari*, 517 U.S. 1107 (1996).

Relator cites *Stewart* for the proposition that "a superior court has the authority" to grant relief in certiorari "[w]hen the facts alleged and proved in a proceeding for habeas corpus are insufficient to justify the relief granted." (Brief at 13-14.) In *Stewart* this Court found that a habeas corpus petitioner was represented by counsel of his own choice and went to trial for a felony one day after the prosecution filed an information charging him with "robbery in the first degree by means of a dangerous and deadly weapon, a capital offense." Defense counsel did not object to the untimeliness of the information. A habeas corpus court held that the petitioner had not received adequate opportunity to prepare and present a defense, with the effect that there was a denial of due process of law, which deprived the *trial* court of jurisdiction. This Court held that evidence of these facts did not justify a circuit court's grant of habeas corpus

relief discharging the prisoner nine years later. It offered no explanation for why its disagreement with the habeas corpus court took the case out of the general rule that certiorari goes only to the jurisdiction of the respondent.

The first thing to remember about *Stewart* is that the prisoner had been released. 357 Mo. at 291, 207 S.W. at 271. There remained no potentiality which needed to be reduced to act in order for the relator warden to suffer cognizable prejudice. A violent criminal had been released in the absence of error preserved in the trial-court record, nine years after the fact, making retrial difficult for the State.

At no point in the opinion does the Court draw in question the general principle of certiorari law that this remedy is not a back-door appeal, but only a means of keeping inferior officers within their jurisdiction. Any attempt to fashion an exception on the basis of this case must include not only the fact that the Court granted relief, but also the danger to the public safety to which the Court was responding in going beyond the accepted usages of law to quash the circuit court record on the facts in *Stewart*.

Relator also cites *Campbell* as behavioral data to support the proposition that "[t]his Court has used certiorari to quash the writ of habeas corpus when it has been issued erroneously." (Brief at 14.) As in *Blair,* the relator can cite no language from the opinion for that

proposition: if the relator *had* advanced that proposition in *Campbell*, the Court would no doubt have rejected it.

In *Campbell*, the question was whether a man who had pleaded guilty to rape under a plea agreement requiring that he be "confined" for two years had to be released on probation when the custodial treatment program in which he had been "confined" was de-funded. The record did not reflect whether the de-funding decision was made by a state or a federal authority. It would not have been in the interests of the admitted rapist himself to be released without having undergone the rehabilitative program for which both parties to the plea agreement had bargained and on which the sentencing court had relied. 906 S.W.2d at 372.

Where the State of Missouri was not shown to be at fault in the matter, and the public interest weighed strongly in favor of enforcing the remaining requirements of the plea agreement, this Court agreed with the relator in *Campbell* that the habeas corpus judge had gone too far in ordering the release of the man who had pleaded guilty to rape and had agreed to be "confined" for two years. Neither this Court nor the undersigned counsel, who of course represented the relator in *Campbell*, asked for that case. Its jurisprudential consequences are best dealt with under the maxim that hard cases make bad law. It is no accident that this is one of only two cases the relator here can cite for ignoring the dozens of cases contra.

The instant case presents no spectre of an untreated rapist being loosed on the innocent people of the State without having served a day in prison. Mr. Edwards has served four and a half years in the Department of Corrections for an offense he has steadfastly denied, and which the relator declined to attempt to prove after the supposed victim had recanted. (App. 114-15.) The circuit court did not decree Mr. Edwards's release, but only that the sentencing court follow the law in place at the time of his original sentencing, and resentence him lawfully. Relator has conceded that the sentencing court did not sentence Mr. Edwards lawfully, but contends that under its idiosyncratic representation of what this Court expected to occur in the circuit court, the respondent erred in granting this limited relief because "would" means "could," and the sentencing court "could" have sentenced Mr. Edwards to eight years even if it had applied the correct statute. The only evidence on this issue before the circuit court was that it "would" not have done so. This case presents no emergency in which the ordinary rule of law need be suspended.

B. Placing the burden of showing absence of jurisdiction on unsuccessful custodians is a principled means of allocating the risk of error in habeas corpus proceedings.

It is difficult for a prisoner to obtain habeas corpus or post-conviction relief. *See, e.g., State ex rel. Simmons v. White*, 866 S.W.2d

443, 446 (Mo. banc 1993). This Court has held the bar high in order to protect the finality of judgments. *Id*.

Because habeas corpus uniquely concerns the liberty of the citizen, however, once a properly constituted tribunal has determined that the citizen is unlawfully restrained of his or her liberty, the burden shifts to the custodian to make a subsequent tribunal believe not merely that the habeas corpus court decided the habeas corpus case differently than it would have, but that the habeas corpus court was not acting within its jurisdiction.

This allocation of risk of error makes special sense because the relator has substantially unlimited resources—the Treasury of a large State—to bring to bear to fund litigation and relitigation of a habeas corpus action. It has already rendered Mr. Edwards a pauper by trying him and enacting statutes effectively to deprive him of any property he may have left after his trial and direct appeal under the guise of "inmate reimbursement." Mo. Rev. Stat. § 217.841. As counsel's motion for extension of time of July 27, 2001, makes clear, Mr. Edwards's family has ceased to support his litigation; the Public Defender System has been appointed, but would not handle this certiorari proceeding; private counsel has continued on the case in order not to abandon Mr. Edwards. Allowing custodians to relitigate the merits of claims for relief that a competent court has already resolved in the accused citizen's favor allows the Attorney General's

Office to run down the clock on a person who is unlawfully restrained of his or her liberty. If an unsuccessful custodian—with the State Treasury at his back—can resist a writ of habeas corpus by successive petitions for writs of certiorari on the ground that the habeas corpus court was just wrong in granting relief, the remedy itself is a sham and inadequate to protect federal constitutional rights.

III. Relator has fundamentally misconstrued this Court's direction to the habeas corpus court regarding the findings required to support a grant of habeas corpus.

Relator has failed to show that the habeas corpus court has inflicted prejudice on him, because its judgment does not mandate the release of Mr. Edwards but only requires the sentencing court to apply the law in force at the time of his original sentencing. Relator has failed to show that the habeas corpus court lacked jurisdiction to grant the relief it granted—only that in a case in which it had territorial and subject-matter jurisdiction, it ruled against the relator.

In principle, the former showings are enough to avoid quashing of the proceedings in the habeas corpus court. As a matter of grace, the respondent shows that the relator has fundamentally misstated what this Court directed the habeas corpus court to consider. Even if this Court reaches the merits of the habeas corpus court's decision, therefore, its writ of certiorari should be quashed.

In its order denying Mr. Edwards's motion to recall the mandate, this Court held that the latter motion was the wrong procedural vehicle for addressing the illegality of Mr. Edwards's sentencing. *State v. Edwards*, 983 S.W.2d 520 (Mo. banc 1999). (App. 204-09.) It held that habeas corpus was the proper vehicle, and described the issues before the habeas corpus court:

> In the trial court, [Mr. Edwards] will have to establish that [1] the sentencing court did sentence him under the old sodomy law that had been repealed and [2] that his sentence exceeds the term that would have been imposed by the sentencing court for his conduct, whether the appropriate punishment is that established for child molestation in the first or second degree under the new statute. [*Id*. at 522. (App. 208-09.)]

At the evidentiary hearing, the relator conceded that the sentencing court sentenced Mr. Edwards under the old statute. (Tr. 67.) Relator asserts that the habeas corpus court failed to follow this Court's directions even though they were so clear as not to *allow* of interpretation: "The language is clear without interpretation." (Brief 15.)

The habeas corpus court interpreted this language, and applied it differently than the relator would have preferred. Relator mischaracterizes the habeas corpus court's interpretation of this language in order to fit an ordinary disagreement between two or more legal professionals about what a set of words means into the category of jurisdictional error he must show in order to receive relief in certiorari.

A. Punishing Mr. Edwards on the basis of an essential element of an offense on which element he has not been tried before a jury and been found guilty beyond a reasonable doubt violates the Sixth and Fourteenth Amendments and Mo. Const. art. I, §§ 10 & 18(a).

Relator also mischaracterizes these instructions to require Mr. Edwards to prove that the recanting complaining witness, K.E., was twelve or older at the time of the alleged touching of her vagina by him. The converse—that she was under the age of twelve at the times of the alleged touchings—was an essential element of the offense of child molestation in the first degree. Mo. Rev. Stat. § 566.067.1 (1994). At trial, this question was not before the jury; at the time of the trial, it sufficed to show that K.E. was under fourteen. Although Mr. Edwards disputes that he did what the prosecution charged at any point, he did not dispute that K.E. was under fourteen

at the time she has formerly said he touched the outside of her vagina. Consequently, there has never been a finding by a jury beyond a reasonable doubt that K.E. was under twelve at the time of *any* of the alleged touchings. To punish Mr. Edwards as if there *had* been would violate the Sixth and Fourteenth Amendments to the Constitution of the United States and Mo. Const. art. I, §§ 10 & 18(a).

In a prosecution for child molestation in the first degree, the age of the minor is an essential element of the offense. Absent a plea of guilty or a valid waiver of the right to jury trial, the trial court must submit the element to the jury, which must either find the accused citizen guilty of this element beyond a reasonable doubt or find him not guilty of the offense. *See Apprendi v. New Jersey*, 120 S.Ct. 2348, 2355-60 & 2362-63 (2000) (citing cases).

Relator cooks the record to attempt to prove that the jury "had" to have believed that K.E. was under twelve at the time of one of the alleged touchings, and that this touching was of the outside of her vagina. (Brief 16-18.) This is exactly the kind of "dry-labbing" that *Apprendi* and the authorities it collects forbid. Any statements to the effect that Mr. Edwards touched K.E. here or there when she was this or that age were not subjected to an adversarial testing because the relevant age at the time of trial was fourteen, and there was no contention she was fourteen or older at the time of the alleged touchings. When her age was not in controversy at trial, it would

have been reckless for defense counsel to have delved into her age at the time of events he contended never took place. If Mr. Edwards is to be punished on the theory that K.E. was under twelve when he allegedly touched her vagina, this element of the offense must be proved to a jury beyond a reasonable doubt, not to a judge sitting alone by a preponderance of the evidence. That requirement comes not from this Court, but from the Constitution as explicated in *Apprendi* and the authorities it collects.

In addition, the trial transcript on the basis of which the relator asserts the jury "had" to have found an element on which it was not instructed was before this Court on transfer from the Missouri Court of Appeals, Western District, after it granted Mr. Edwards's motion to recall the mandate. It would not make sense to say this Court believed the parties needed to litigate the effect of the testimony at trial when it had the same record before it. It makes much more sense to conclude that the Court intended the habeas corpus court to take evidence on trial counsel's perceptions of the sentencing process and to apply its own judgment—as a tribunal that sentences people itself—about the difference it would have made if the sentencing court had applied the correct statute.

Respondent notes that the relator relies heavily on the testimony of K.E. By the time of the trial, she had already recanted her testimony. (App. .114-15.)

Under all of the foregoing facts and circumstances, the respondent di did not even err in refusing to require Mr. Edwards to disprove an element of the offense. Respondent is a neutral third party who has decided a case within his jurisdiction. He did not exceed his jurisdiction by deciding it contrary to the relator.

B. Relator reads the word "would" to mean "could" in asserting what the respondent needed to find in order to grant relief consistently with this Court's January 5, 1999, opinion.

Relator gets to the conclusion that Mr. Edwards had to prove or disprove K.E.'s age at the time or times he alleged touched her vagina by reading the word "would" in this Court's January 5, 1999, opinion as if this Court had said "could."

Relator starts with the premise that if K.E. were eleven at the time Mr. Edwards allegedly touched her on the vagina, the sentencing court could have sentenced him to as many as twenty years. (Brief 19.) That is the range of punishment for a class C felony such as child molestation in the first degree, Mo. Rev. Stat. § 556.067.1 (1994), as enhanced because Mr. Edwards has been found to be a "persistent offender." *Compare* Mo. Rev. Stat. § 558.018.7(3) (1994) *with* App. 81-86 (trial transcript).

Relator's next step is that if Mr. Edwards touched K.E.'s vagina when she was under twelve, he *could* have lawfully been sentenced for child molestation in the first degree, and could receive as much as twenty years. Because he received eight, the argument goes, he did not suffer prejudice from the sentencing court's error.

This is where the pea goes from one shell to the next. This Court did not ask whether the sentencing court *could* have sentenced Mr. Edwards to eight years if it had applied the correct statute; it knew the sentencing court *could* have done so. It asked whether the sentencing court "would" have sentenced him to eight years if it had applied the correct statute. Whereas the "could" question relates to sufficiency of the evidence, the "would" question relates to judicial behavior.

In this respect the "would" question resembles the questions about prejudice and materiality one asks in cases arising under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Brady v. Maryland*, 373 U.S. 83 (1963): is there a "reasonable probability" that "the result would have been different" if the deficient defense attorney performance or the prosecutorial misconduct had not occurred? The inquiry which this Court told the habeas corpus court to undertake is like the *Strickland* and *Brady* inquiries in that it directed the habeas

corpus court to decide whether the sentence would have been different if the use of the old statute in sentencing had not occurred.

Mr. Edwards sought to answer the "would" question by adducing testimony from trial counsel concerning the range of punishment and the sentencing judge's attitude toward Mr. Edwards, and by referring the habeas corpus court to the sentencing transcript to provide insight into the sentencing court's decision. The latter supports trial counsel's testimony that the sentencing judge did not intend to "hammer" Mr. Edwards:

> I will say this, that in terms of the offenses which have been proven against you, in terms of the report anyway, that we have, that they are not characteristic of your conduct. What is more characteristic, perhaps, is the drinking and what that has brought about, and probably brought this, these episodes, about as well. It's not at all to minimize the seriousness of these events for the child. [App. 176-77.]

In addition to these factors, trial counsel explained to the sentencing judge that "some of the jurors came up to me afterwards and it was a real close call for them. And I think that persuaded the judge to lower to sentence he might have initially talked about." (Tr. 11.)

In light of the sentencing court's relatively merciful intentions in sentencing, the range the sentencing court thought it had available becomes critical to answering the "would" question. Trial counsel testified the trial judge thought the range available to him was five years to life imprisonment. (Tr. 9-10.) Consequently, the sentence of eight years that the trial judge imposed was "three years up from the bottom of the range and say 40 or 50 years down from the top of the range." (Tr. 12.)

If the sentencing court had applied the correct range of punishment, and if we assume that the proper charge was the heavier one, it would have run from zero to twenty years: there would have been no minimum, when the sentencing court thought there was a five-year minimum; there would have been a cap of twenty years, when the sentencing court thought that the range extended to life imprisonment. Unless this Court believes that sentencing judges pay no attention to the range of punishment except to check after the fact to see if their sentences fall within it, it will find that the difference in range of punishment that the use of the incorrect statute affected the sentence the trial judge imposed. In other words, the sentence "would" have been shorter if the sentencing court had applied the correct statute.

C. This Court took the question whether Mr. Edwards touched K.E.'s vagina away from the habeas corpus court by specifying that the question before it was whether his sentence would have been different under the correct statute "whether the appropriate punishment is that established for child molestation in the first or second degree under the new statute."

If the Court had posed the question whether Mr. Edwards's present, illegal, sentence "exceeds the term that would have been imposed by the sentencing court for his conduct," and had left it at that, the question would have arisen whether he should have been sentenced for child molestation in the first degree or for child molestation in the second degree. Answering this question could have impermissibly involved a finding of guilt or innocence on an essential element of an offense. Under *Apprendi* and the authorities on which it relies, neither a habeas corpus court nor an appellate court could have reached a result adverse to Mr. Edwards on this issue, because to do so would have been to subject him to punishment in derogation of his right to a jury trial and right not to be convicted except on proof beyond a reasonable doubt of every essential element of the offense charged.

This Court did not create such an issue. It qualified the question quoted in the previous paragraph with the words "whether the appropriate punishment is that established for child molestation in the first or second degree under the new statute." Given the Court's words and punctuation, this clause has the effect that the Court's question means *whichever* of the punishments was appropriate, *would* Mr. Edwards's sentence have been different if the sentencing court had applied the correct statute?

In light of this qualification, it was already clear when this Court issued its January 5, 2000, opinion that the sentencing court *could* have sentenced Mr. Edwards to as much as twenty years if "the appropriate punishment is that established for child molestation in the first degree . . . under the new statute." This was one of the alternatives included in the Court's question. The other alternative was whether the sentence would have been different "if the appropriate punishment is that established for child molestation . . . in the second degree under the new statute." Because this punishment would have been the one for a class A misdemeanor, *i.e.*, up to one year in the county jail, it follows by operation of law that the sentence would have been different if this provision covered the facts the jury found.

But the question was whether his punishment *would* have been different, not whether it *could* have been different. Mr. Edwards has

demonstrated that in light of the difference in the range of punishments between the old, incorrect statute, and the statute in force at the time of sentencing, combined with the sentencing court's disposition to come up a little from the bottom of the range and down a lot from the top of the range, his sentence would have been shorter if the sentencing court had applied the correct statute.

Conclusion

WHEREFORE, the appellant prays the Court for its order that its former preliminary writ of certiorari be quashed.

Respectfully submitted,

JOHN WILLIAM SIMON
Mo. Bar No. 34535

P.O. Box 16005
Clayton, Missouri 63105

(314) 645-1776
FAX (314) 645-2125

Attorney for Appellant

Certificate of Compliance

I certify that (1) the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 7295 words, excluding the cover, this certification, the certificate of service, and the signature block, as determined by Word 10.0; and (2) the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and that Norton Antivirus 2001 reports that it is virus-free.

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Attorney for Appellant

Certificate of Service

I hereby certify that two (2) true and correct copies of the foregoing were hand-delivered, this ____ day of September, 2001, to:

Stephen David Hawke, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

_____
Attorney for Appellant